No. 619

In the Supreme Court of the United States

October Term, 1944.

THE CREEK INDIANS NATIONAL COUNCIL, BY C. W. WARD, PRESIDENT, AND WASHINGTON ADAMS, SECRETARY-TREASURER, FOR AND ON BEHALF OF THEMSELVES AND 18,765 OTHER MEMBERS OF THE CREEK TRIBE OF INDIANS, AND THEIR HEIRS,

Petitioners,

vs.

SINCLAIR PRAIRIE OIL COMPANY, A CORPORATION, H. G. BARNARD, N. B. FEAGAN, ARCH H. HYDEN, AS ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF SARAH C. GETTY, DECEASED, AND BARDON OIL COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

EDWARD H. CHANDLER,
RALPH W. GARRETT,
SUMMERS HARDY,
CLAUDE H. ROSENSTEIN,
JOHN ROGERS,
CARTER SMITH,
Tulsa, Oklahoma,

Counsel for Respondents.

Of Counsel:
ROBERT L. IMLER,
Tulsa, Oklahoma.

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The respondents believe that the opinion of the United States Circuit Court of Appeals set forth the record and the facts, save and except that it is necessary, by reason of contentions made by petitioners, to consider the following additional facts:

Supplemental Statement.

With respect to the sustaining of the motion for summary judgment (R. 116), said motion was supported not only by the record in the case of *United States* v. *Sinclair Oil and Gas Company, et al.,* No. 14 Equity, but also by the amended complaint (R. 87), motion of defendant to dismiss (R. 103), and order of dismissal (R. 105) in the case of *Creek Nation of Indians* v. *Nancy Barnett, et al.,* No. 367 Civil.

After judgment was rendered against the United States in No. 14 Equity on December 14, 1925, and, to-wit, on October 25, 1940, the Creek Nation of Indians, by Alex Noon, Principal Chief, brought suit against the respondent herein in the United States District Court for the Northern District of Oklahoma, being No. 367 Civil in said court, and made the same claim for relief based upon the same facts as was made in No. 14 Equity (R. 87). Respondent Sinclair Prairie Oil Company (formerly Sinclair Oil and Gas Company) filed its motion to dismiss the amended complaint of the Creek Nation of Indians on November 4, 1940 (R. 103), and on January 22, 1941, said motion to dismiss said amended complaint was sustained (R. 105). In the amended complaint in No. 367 the Creek Nation of Indians alleged that the dismissal with prejudice in No. 14 Equity was not effective to dispose of said cause upon the merits (R. 93-94) because notice was not given to the Creek Tribe in accordance with Section 2 of the Curtis Act of June 28, 1898 (30 Stat. 495). No appeal was ever taken from this judgment. This judgment in No. 367 Civil was relied upon as well as the judgment in No. 14 Equity as being conclusive of the present controversy.

Petitioners now for the first time contend that the "No-

tice of Application for Removal" shows that it was not served upon the plaintiffs or their attorney of record. But the District Court of Creek County, Oklahoma, in its order of removal, found that petitioners were served (R. 33), and further, that petitioners appeared at the removal proceedings in the state court and objected and excepted to the order of removal, as is shown by the minutes of the court clerk of Creek County, Oklahoma (R. 73), and the order of removal aforesaid.

Certificate of the court clerk for the United States District Court for the Northern District of Oklahoma filed herewith (a copy of which is "Exhibit A" hereto) in the office of the clerk of this court, shows that the transcript on removal of the removal proceedings had in the state court and now on file in the office of the court clerk for the United States District Court for the Northern District of Oklahoma shows that "W. R. Kerr," attorney for plaintiffs (petitioners here) was served with notice of filing of said petition and bond for removal prior to the making of the order of removal by the state court, and that by inadvertence and mistake this service was not shown in the record of this case prepared for the United States Circuit Court of Appeals for the Tenth Circuit.

Respondents have requested petitioners to stipulate that service was made as shown by the certificate of the court clerk aforesaid but petitioners refused to so stipulate.

BRIEF.

We shall undertake to reply to the brief of petitioners in the order that said propositions are raised by them, and in order to identify these propositions we shall refer to them in the manner referred to by petitioners.

The record with respect to the notice of application for removal is sufficient to sustain the jurisdiction of the Federal Court.

This question is raised under petitioners' "*Reason Relied on No. 1.*" This presents the contention that the record as originally filed in this court fails to show that service of the notice of application for removal was had upon the plaintiffs or their attorney of record. The facts with reference to this are shown by "Exhibit A"; it therefore has no merit. If for any reason this exhibit is not properly before this court, this proposition, raised for the first time in this court, is without merit.

While Section 29 of the Judicial Code (Title 28, Sec. 72, U. S. C. A.) requires that written notice of the removal petition and bond shall be given the adverse party or parties prior to filing the same, no method of proof of service is prescribed. The finding of the state court at the time of the presentation to it of removal petition and bond that notice had been given should therefore be sufficient.

Furthermore, while many cases in inferior federal tribunals have held that the giving of this notice is mandatory, it is not jurisdictional but modal and formal and can be waived.

This court has held that Section 28 of the Judicial Code (Title 28, Sec. 71, U. S. C. A.) defines the cases in which removal may be made; and Sec. 29 (Title 28, Sec. 72, U. S. C. A.) provides the procedure for removal and the time in which it should be applied for. It was further held that the requirements of Sec. 28 are jurisdictional, can be raised at any time, and cannot be waived, whereas the requirements of the modal and formal section can be waived.

—*Ayers* v. *Watson*, 113 U. S. 594, 28 L. ed. 1093;

Gerling v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 38 L. ed. 311.

The petitioners in this case have waived this point for the reason that they do not raise it in their motion to remand. While the motion to remand does say that the court had no jurisdiction under said attempted removal and that the court is without jurisdiction of the subject-matter of the action, this objection not being jurisdictional is not raised by said grounds in said motion to remand.

If this notice of removal were deemed to be jurisdictional, which it is not, the finding of the state court that it had been served according to law would be conclusive, for it is the duty of the state court before it surrenders its jurisdiction to determine on the record before it whether the case is a removable one, and in so determining it would be necessary to determine whether the notice had been given.

—*Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 49 L. ed. 462;

Stone v. *South Carolina*, 117 U. S. 430, 29 L. ed. 962.

In addition, the plaintiffs were present in the state court, as shown by the minute of the court wherein it was shown that they excepted, and being thus present, the purpose of the law has been served.

—*French* v. *United Gas Public Service Co.*, (D. C. W. D. La.) 16 Fed. Supp. 837;

Pyatt v. *Prudential Ins. Co.*, (D. C. W. D. Mo.) 38 Fed. Supp. 527;

Bank of America v. *United States National Bank*, (D. C. S. D. Cal.) 3 Fed. Supp. 990.

The facts set forth in the removal petition are sufficient to sustain the jurisdiction of the Federal Court and to justify the overruling of the motion to remand.

The contentions in this respect are set forth under "*Reason Relied on No. 2.*" This consists of a number of arguments with respect to the overruling of the motion to remand, and, without attempting to follow in detail petitioners' method of approach, we will answer their contentions.

No effort was made to remove this cause under "Mason's Code, Sec. 30, being U. S. Code, Title 28, Sec. 73." This cause was removed on the grounds that the petition stated what is commonly denominated a Federal question, and that there is set forth in the petition a controversy wholly between citizens of different states which can be fully determined between them; that is, a separable controversy. The Circuit Court of Appeals in its opinion held that a Federal question was stated but did not pass on whether or not the only defendant appearing or served could remove for this reason. It is still our position that one party could remove on the ground of the existence of a Federal question, in view of the language of Sec. 28 of the Judicial Code (Title 28, Sec. 71, U. S. C. A.), as follows:

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction, in any state court, may be removed *by the defendant or defendants therein* to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction, in any state court, may be removed into the District Court

of the United States for the proper district *by the defendant or defendants therein,* being nonresidents of that state."

In view of the fact that it has been held that the only defendant served or appearing may remove under the second clause italicized above—*Pullman Co.* v. *Jenkins,* 305 U. S. 534, 83 L. ed. 334—we think clearly such one defendant could remove under the first clause above italicized.

Chicago, R. I. & P. Ry. Co. v. *Martin,* 178 U. S. 245, 44 L. ed. 1055:

> "This being so the case came solely within the first clause of the section, and we are of the opinion that it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and second clauses of Section 2 of the Act of 1887-8."

The overruling of the motion to remand was sustained by the Circuit Court of Appeals on the ground that the petition sets forth a separable controversy, and the opinion of that court covers the facts and the law with respect to this proposition.

The separable controversy stated is one between citizens of Oklahoma and Minnehoma Oil Company and Minnehoma Oil and Gas Company, citizens of Arizona, Reserve Petroleum Company and Reserve Development Company, citizens of Delaware, and Sinclair Prairie Oil Company, a citizen of Maine. The case was removed by Sinclair Prairie Oil Company, which was the only defendant served or appearing and comes squarely within the principle of *Pullman Co.* v. *Jenkins, supra.*

In their brief petitioners have attempted to have the court consider, in determining whether there was a proper

removal, matters which appear in the record after the case was removed. The removability of a case is to be determined according to plaintiffs' pleadings at the time of the petition for removal. *Pullman Co.* v. *Jenkins, supra.*

We are making no answer to "Reason Relied on No. 3," as no argument is presented by petitioners in support thereof.

Notice was not required to be served upon the Chief or Governor of the Creek Tribe in Cause No. 14 Equity.

(This is in reply to "Reason Relied on No. 4.")

The petitioners here rely on Section 2 of the Act of Congress of June 28, 1898 (30 Stat. 495), known as the Curtis Act, which section is set forth at page 15 of their brief. The later Act of April 26, 1906, Section 18 (34 Stat. 137), set forth in petitioners' brief at page 21, was clearly intended to provide a more effective method of protecting the interests of the Creek Tribe by having the Secretary of the Interior authorized to bring suit in the name of the United States for the use of the Creek Tribe. There is nothing in this section that indicates that any notice to any official of the Creek Nation is necessary, and such notice would, in fact, be a useless formality for the reason that the United States is appearing for the Creek Nation; the Creek Nation is therefore a party to the litigation and for that reason would not have to be notified. *Heckman* v. *United States,* 224 U. S. 413, 32 S. C. 424, 56 L. ed. 820, was a case where the United States brought suit on behalf of individual allottees of the Five Civilized Tribes under an analogous statute, and in which it was urged that the individual Indian had to be before the court. This court said:

> "The argument necessarily proceeds upon the assumption that the representation of these Indians by

the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

"When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the Act of Congress they were precluded from alienating their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States. This is involved necessarily in the conclusion

that the United States is entitled to sue, and in the nature and purpose of the suit."

As was pointed out by the Circuit Court of Appeals in its opinion in this cause, the suit by the Government in No. 14 Equity was not only in its own right, but also for and in behalf of the Creek Tribe of Indians. Furthermore, as has been heretofore pointed out in the additional statement of facts herein, this question was pleaded in *Creek Nation of Indians* v. *Sinclair Prairie Oil Company, et al.,* No. 367 Civil, and a judgment was entered against the Creek Nation which was unappealed from; therefore this question of notice has been adjudicated, and the adjudication is, as has been pointed out in such additional statement of facts, a matter of record in this cause.

The petitioners are bound by the judgment in Equity No. 14 and the judgment in Civil No. 367.

(This is in reply to petitioners' "Reason No. 5.")

The Circuit Court of Appeals found that the facts on which relief is asked for and the relief asked for in Equity No. 14 are the same as in the case at bar; this also can be said of Civil No. 367. We are not clear as to whether it is petitioners' contention that the Creek Nation or Tribe is not bound by the judgments, attached to the motion for summary judgment as exhibits (R. 82-105), in said two former causes above, or whether it is also their contention that even if the Creek Nation is bound, the individual members of the tribe are not bound. In either case, the Circuit Court of Appeals in its opinion in this cause adequately answers their contention. We again wish to call attention to *Heckman* v. *United States, supra,* wherein it is said:

"These considerations also dispose of the contention that, by reason of the absence of the grantors as

parties, the grantees are placed in danger of double litigation; so that if they should succeed here, they would still be exposed to suit by the allottees. It is not pertinent to comment upon the improbability of the contingency, if it exists in legal contemplation. But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. *Kerrison* v. *Stewart,* 93 U. S. 155, 160, 23 L. ed. 843; *Shaw* v. *Little Rock & Ft. S. R. Co.,* 100 U. S. 605, 611, 25 L. ed. 757, 758; *Beals* v. *Illinois M. & T. R. Co.,* 135 U. S. 290, 295, 33 L. ed. 608, 611, 10 Sup. Ct. Rep. 314. And it could not, consistently with any principle, be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the questions."

The principles in that case under an analogous statute are applicable here. See also:

Vinson v. *Graham,* (C. C. A. 10) 44 F. (2d) 772, cert. den. 283 U. S. 820, 75 L. ed. 1435;

Mars v. *McDougal,* (C. C. A. 10) 40 F. (2d) 247, cert. den. 282 U. S. 850, 75 L. ed. 753;

Conner v. *Cornell,* (C. C. A. 8th, 1929) 32 F. (2d) 581, cert. den. 280 U. S. 583, 74 L. ed. 632.

As to the authority of the Attorney General of the United States to dismiss with prejudice, see:

Conner v. *Cornell, supra;*

Mars v. *McDougal, supra.*

The case of *Carey* v. *Brown,* 92 U. S. 171, 23 L. ed. 469, while it states the general rule as set forth in petitioners'

brief, also sets forth as an exception to this general rule that, where the suit is brought by the trustee to recover the property or to reduce it to possession, and it in nowise affects his relation with his *cestuis que trustent,* it is unnecessary to make the latter parties. This is the case here.

Conclusion.

Respondents respectfully contend that the decrees entered by the trial court and the Circuit Court of Appeals for the Tenth Circuit are correct under the authorities and reasons herein and therein set forth, and that no substantial or meritorious question is presented for review; therefore the petition for writ of *certiorari* should be denied.

Dated this 9th day of November, 1944.

Respectfully submitted,

EDWARD H. CHANDLER,
RALPH W. GARRETT,
714 Sinclair Building,
Tulsa, Oklahoma,
SUMMERS HARDY,
710 Ritz Building,
Tulsa, Oklahoma,
CLAUDE H. ROSENSTEIN,
504 Atlas Building,
Tulsa, Oklahoma,
JOHN ROGERS,
Drew Building,
Tulsa, Oklahoma,
CARTER SMITH,
Court Arcade Building,
Tulsa, Oklahoma,
Counsel for Respondents.

Of Counsel:
ROBERT L. IMLER,
Sinclair Building,
Tulsa, Oklahoma.

"Exhibit A."

In the United States District Court for the Northern District of Oklahoma. The Creek Indians National Council by C. W. Ward, President, and Washington Adams, Secretary-Treasurer, for and on behalf of themselves and 18,765 other members of the Creek Tribe of Indians, and their heirs, Plaintiff, vs. Nancy Barnett, Sinclair Prairie Oil Company, a corporation, H. G. Barnard, N. B. Feagan, Arch H. Hyden, as Administrator with will annexed of the Estate of Sarah C. Getty, deceased; and Bardon Oil Company, et al., Defendants.—No. 927 Civil.

United States of America, Northern District of Oklahoma —ss:

I, H. P. Warfield, Clerk of the United States District Court for the Northern District of Oklahoma, do hereby certify that the transcript for removal of the above cause, duly certified by the Court Clerk in and for Creek County, Oklahoma, and on file in this court, shows a notice of application for removal and as a part thereof further shows the following:

"Service of the above and foregoing Notice with Exhibits attached is hereby acknowledged this 23rd day of November, 1942.

W. R. Kerr,
Attorney for Plaintiffs."

That if the record certified to by me on the 10th day of August, 1943, and filed in the United States Circuit Court of Appeals for the Tenth Circuit shows the following:

"Service of the above and foregoing Notice with Exhibits attached is hereby acknowledged this 23rd day of November, 1942.

....,
Attorney for Plaintiffs,"

the name of W. R. Kerr was omitted through inadvertence and mistake.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Tulsa, Oklahoma, this 1st day of November, 1944.

H. P. WARFIELD, Clerk,

(Seal) By M. M. EWING, Deputy.